MRCB BUILDERS SDN BHD v. SOUTHERN BUILDERS SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, JOHOR BAHRU
MOHD IVAN HUSSEIN JC
[ORIGINATING SUMMONS NO: JA-24NCVC-92-02-2017
& WA-24C-20-02-2017]
2 JANUARY 2018

CONSTRUCTION LAW: *Adjudication – Setting aside – Payment claims – Adjudicator went through progress claims and left issues which needed proving – Whether adjudicator acted in excess of his jurisdiction – Whether there was denial of natural justice when adjudicator left issues unaddressed – Whether adjudication decision ought to be enforced – Construction Industry Payment and Adjudication Act 2012, ss. 15(b), (c), (d), 25(n), 28, 37(1)*

MRCB Builders Sdn Bhd ('MRCB'), the main contractor, appointed Southern Builders Sdn Bhd ('SB') as the subcontrator to perform works for a project. According to SB, it had submitted progress claims Nos. 1 to 9. Payments under claims Nos. 1 to 7 were not paid in full while progress claims Nos. 7 and 9 were not paid at all. SB served a payment claim on MRCB under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). This was met with a payment response, leading the matter to an adjudication by an adjudicator. The adjudicator went through the progress claims and essentially, left the issues of LAD and set-offs, where he found insufficient evidence in the way of proof, to be resolved in another forum. The adjudicator allowed much of SB's claims but not the MRCB's claim for LAD and set-offs. Hence, the present consolidated suits. In one suit, MRCB applied to set aside the adjudication decisions on the grounds that (i) the adjudicator acted in excess of his jurisdiction by reviewing and revising the payment certificate when the same was not part of SB's claim and he ought to have confined his decision to the payment claim and response; (ii) there was denial of natural justice regarding the issues of progress claims being under-certified, the LAD and set-off. In the other suit, SB applied to enforce the adjudication decision.

Held (allowing SB's application; dismissing MRCB's application):

(1) The adjudicator had not acted outside his jurisdiction. As he had based his decision on a construction contract, it would be within his jurisdiction to decide even if no certificate had been issued. (para 16)

(2) What is within the forefront of the CIPAA is to adjudicate on payment claims. To decline to adjudicate on matters such as LAD and set-offs was not quite the same as rejecting these claims entirely. The adjudicator had gone on with the task at hand and arrived at his decision as to how the progress claims were to be addressed. The adjudicator had looked at the set-offs and counterclaim, and found too many uncertainties thus

A best resolved at another time. His reasons had been given. The decision to let set-off and counterclaim was on the basis that there were no sufficient materials or conclusiveness, which would only come at the end of the project and that would be when the issue could be dealt with comprehensively. (paras 25, 28, 29 & 30)

B **Case(s) referred to:**

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal [2016] 1 LNS 1522 CA ***(refd)***

Balfour Beatty Construction Ltd v. Mayor & Burgess London Borough of Lambeth Balfour [2002] Adj LR 04/12 ***(refd)***

C *Ranhill E & C Sdn Bhd v. Tioxide (Malaysia) Sdn Bhd & Other Cases [2015] 1 LNS 1435 HC* ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***

UDA Holdings v. Bisraya Construction Sdn Bhd & Anor And Another Case [2015] 5 CLJ 527 HC ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd [2015] MLJU 695 ***(refd)***

D **Legislation referred to:**

Construction Industry Payment and Adjudication Act 2012, ss. 15(b), (c), (d), 25(n), 28, 37(1)

For the appellant - Amrit Pal Singh Jaginder Singh; M/s Amrit & Company
For the respondent - Samrith Kaur; M/s Samrith Sanjiv & Partners

E *Reported by Najib Tamby*

JUDGMENT

Mohd Ivan Hussein JC:

F **[1]** The plaintiff ("MRCB") in this case has applied to set aside an adjudication decision made on 30 December 2016 pursuant to s. 15(b), (c) and (d) of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") which was in favour of the defendant.

G **[2]** The defendant ("Southern") is the plaintiff in the other case consolidated with this case, who has applied to enforce the adjudication decision under s. 28 of CIPAA.

[3] The plaintiff, as the main contractor, had appointed the defendant (as sub-contractor) to perform RC Structure Works for "The DesaDesaru" H project under a letter of award dated 4 August 2015, commencing on 6 August 2015 and to be completed on 14 July 2016.

[4] The complaint by the defendant was that it had submitted progress claims no. 1 to no. 9, where payments under claims nos. 1 to 7 had not been paid in full, and claims nos. 8 and 9 had not been paid at all, as well as I variation order.

[5] The procedure under CIPAA was initiated by the defendant serving a payment claim on the plaintiff on 25 July 2016, which was met with a payment response, leading all the way to the matter being adjudicated and a decision rendered on 30 December 2016.

[6] In that decision, the adjudicator had allowed much of the defendant's claims but not the plaintiff's claims for liquidated and ascertained damages (LAD) and set-offs.

[7] The first point raised in the plaintiff's submission was that the adjudicator had acted in excess of his jurisdiction as cl. 23.1 in the letter of award had provided for a dispute resolution mechanism where any dispute or difference must be referred in the first instance to a panel comprising the director of the main contractor, the managing director of the sub-contractor and one expert.

[8] This issue did not seem to have been ventilated in the adjudication process as the decision made no mention of such objection or challenge being made or taken. As such, I can only assume that strict reliance was not seriously pursued by the plaintiff who had allowed the adjudication process to take its course.

[9] We must be mindful that CIPAA is relatively recent, where s. 37(1) states:

> A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.

[10] In its preamble, CIPAA was "An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide connected and incidental matters."

[11] In his decision, the adjudicator had stated that "the purpose of interim valuation that Malaysia construction industry are accustomed to (unlike the invoice system in some countries), is that the interim are just reliefs providing the 'temporary finality'".

[12] It would be important to first understand the workings of CIPAA, which is a relatively recent legislation, and the purpose that it was intended to serve.

[13] In *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal* [2016] 1 LNS 1522; [2016] MLJU 1776, the Court of Appeal had touched on the rationale and approach of CIPAA as follows:

> [14] The philosophy behind the adjudication regime in the construction industry can be said to be encapsulated in s. 12 of the CIPAA 2012 which reads as follows:
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> (1) The adjudicator shall conduct the adjudication in the manner as the adjudicator considers appropriate within the powers provided under section 25.

A (2) Subject to sub-s. 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within:

(a) forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later;

B (b) forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or

(c) such further time as agreed to by the parties.

C (3) An adjudication decision which is not made within the period specified in sub-s. (2) is void.

(4) The adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties.

D (5) The adjudication decision shall also determine the adjudicated amount and the time and manner the adjudicated amount is payable.

(6) The adjudicator shall serve a copy of the adjudication decision, including any corrected adjudication decision made under sub-s. (7), on the parties and the director of the KLRCA.

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(7) The adjudicator may at any time correct any computational or typographical error on the adjudicator's own initiative or at the request of any party.

(8) The enforcement of the adjudication decision shall not be affected in any way by a request for correction under sub-s. (7) and any correction made is deemed to take effect from the date of the original adjudication decision.

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(9) The Evidence Act 1950 (Act 56) shall not apply to adjudication proceedings under this Act.

G [15] The philosophy is simply this. Prior to the introduction of CIPAA 2012, claims by subcontractors against the main contractors were not able to be resolved in a speedy and economical manner. The only redress was to launch a suit in court and then apply for summary judgments with the hope that the courts would grant such summary judgments. Such applications invariably have difficulties as the H threshold for such application to succeed is quite high as the subcontractor has to show that there are no triable issues for the court to adjudicate or in short the defence of the contractor has no merit at all. It cannot be disputed that this sort of litigation has given rise to financial hardship to the subcontractors so much so that some had lost all the benefits of the subcontracts. It also cannot be I disputed that the contractors have taken advantage of the intricacies of the judicial system by withholding payments without valid reasons.

[16] To overcome the aforesaid shortcomings and with the aim of making the construction industry a fair playing field for the players, Parliament in various commonwealth countries saw it fit to introduce an adjudication regime in which interim claims made by subcontractors can be dealt with by appointed adjudicators in a speedy and economical manner. The benefit of such regime is plain and obvious in that claims of subcontractors, being the lifeline of their survival, must not be delayed without valid reasons by the contractors. In short, the unnecessary stoppage of money flow would be avoided.

[17] In the context of our jurisdiction, CIPAA 2012 was enacted and from s. 12 we can discern features such as a specific time frame of 90 days for the adjudicator to decide on the dispute between the subcontractor and contractor with the specific provision that any decision reached after the aforesaid period is deemed void and the non-applicability of the Evidence Act which evoke the intentions of the Parliament to ensure claims of the subcontractors are dealt with within a reasonable time frame.

[14] In the case of *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case* [2015] 5 CLJ 527, the court had traced the legislative background of CIPAA in the following paragraphs set out below:

130. From this examination, it can thus be seen that the legislative bodies of the respective jurisdictions discussed all had substantially the same common intention, object and purpose in enacting their own versions of CIPAA as our Parliament in relation to CIPAA. Adjudication was considered the most viable option in addressing the same ills or inequitable practices faced by the construction industries the world over - payment disputes over progress or stage payments. The disputes invariably were on delayed, insufficient or simply non-payment of interim claims made by main, subcontractors or sub-subcontractors.

132. It can be reasonably be deduced that the hallmarks of adjudication or the key elements of adjudication would be the provision of a speedy, interim resolution mechanism for payment disputes. When an adjudication decision results in payments, there are remedies for recovery of such payments. Given that it is only an interim remedy to uncork the blockage in the cash flow which is the lifeblood of the construction industry, it may be, in a sense, be likened to a stent that is frequently put in place in arterial blockages through angioplasty etc. The experiences of other jurisdictions have been positive and encouraging; such that the Malaysian Parliament has seen fit to duplicate, but with modifications, many of the provisions found in the relevant legislation of those jurisdictions.

133. Here, I am once again reminded of what May LJ said in *Pegram Shopfitters Ltd v. Tally Weijl (UK) Ltd* of how it is in the nature of construction contracts to "generate disputes about payment". Where there are "delays, variations or other causes of additional

> expense, those who do the work often consider themselves entitled to additional payment. Those who have the work done often have reasons, good or bad, for saying that the additional payment is not due." This diametrically opposing stance unfortunately, does no one any good; including for instance the innocent purchaser of the property; or the owner of the property being developed. This impasse was recognised as stifling the lifeblood of the industry that policy intervention through legislation was seen fit. CIPAA is intended to provide an intervening provisional decision or "a temporary balance ... in appropriate circumstances ... in favour of those who claim payment, at the temporary expense if necessary of those who pay". These adjudication decisions, 'being quick and dirty', also "provide a quick enforceable interim decision under the rubric of 'pay now, argue later'", are necessary so as to give "life" back to the enterprise or underlying contract which had reached an impasse or stalemate. It is in the very nature of the scheme or mechanism that the substantive issues relating to the payment can still be argued at a later point; or taken concurrently at separate proceedings initiated in Court or at arbitration.

[15] The plaintiff had further argued that the adjudicator had exceeded his jurisdiction in reviewing and revising the payment certificate when the same was not part of the defendant's claim, and that the adjudicator ought to have confined his decision to the payment claim and response. Reliance was placed on the decision in the case of *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2015] MLJU 695.

[16] As the adjudicator had based his decision on a construction contract, and that it would be within his jurisdiction to decide even if no certificate had been issued (s. 25(n) CIPAA), I find that the adjudicator had not acted outside jurisdiction.

[17] In respect of the plaintiff's next contention that there was denial of natural justice, reference was made to the case of *Ranhill E & C Sdn Bhd v. Tioxide (Malaysia) Sdn Bhd & Other Cases* [2015] 1 LNS 1435 in particular to para. 92 as follows:

> [92] In order for there to have been a denial of natural justice by the Adjudicator, Tioxide must show *inter alia*:
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> (a) that the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to have been given the opportunity to comment upon if decisive or of considerable potential importance to the outcome of the resolution;
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> (b) that the adjudicator has gone off on a frolic of his own, ie, deciding a case based on a factual or legal basis which has not been argued or put forward by either side;
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> (c) that the adjudicator has decided on an issue or issues outside his jurisdiction;

(d) that the adjudicator deliberately took an erroneously restrictive view of his own jurisdiction with the result that he decides not to consider an important or material element of the dispute referred to him.

[18] The complaint of denial of natural justice was made in three areas, firstly, on the issue of progress claims being under certified, secondly, on LAD and lastly, on set-off.

[19] The adjudicator had gone through the progress claims in an effort to determine what were the amounts that should be rightly due given the circumstances. In so doing, he had arrived at a finding that the sub-contractor's claims and details provided had met with the requirements of cl. 7.1 of the letter of award.

[20] On the LAD issue, the adjudicator had directed his mind to the same but had found the provision of LAD in the contract to be too contentious so as to be able to safely rely on the representations made by the plaintiff.

[21] There was evidence from the plaintiff's own document that site possession was actually given only on 1 September 2015 and that, as at the adjudication proceedings, the contract had yet to reach the final account. Also, the issue of extension of time (EOT) had remained open.

[22] The set-offs claimed by the plaintiff was dealt with in a similar manner, where the adjudicator had stated:

> Thus when deductions are made where issues are contentious more so unilaterally, such deductions are not equitable. This does not mean that I do not recognise the right of deduction; but in absence of any reciprocal communication, the forum to deal with it can be in a separate recourse that the contract provides, in this case clause 23 LA and 30 Co Sc.
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> Therefore I decide to exclude back-charges and such like deductions, in my decision.

[23] Essentially, the adjudicator had left the issues of LAD and set-offs, where he had found insufficient evidence in the way of proof to be resolved in another forum.

[24] The plaintiff has considered the approach taken by the adjudicator in preferring such issues be best dealt with in another forum to be an erroneously restrictive view of his own jurisdiction, which is in breach of natural justice and warrants the decision to be set aside.

[25] However, it is to be noted that what is within the forefront of CIPAA is to adjudicate on payment claims. To decline to adjudicate on matters such as LAD and set-offs as in this case is not quite the same as rejecting these claims entirely.

[26] There was also the issue of proving loss and damage, much along the lines of the case of *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 817.

[27] The case of *Balfour Beatty Construction Ltd v. Mayor & Burgess London Borough of Lambeth Balfour* [2002] Adj LR 04/12 has often been cited in particular where Humphrey Lloyd J had stated therein as follows:

> 29. Nevertheless, in my judgment, that which is applicable in arbitration is basically applicable to adjudication but, in determining whether a party has been treated fairly or in determining whether the adjudicator has acted impartially, it is very necessary to bear in mind that the point or issue which is to be brought to the attention of the parties must be one of which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant. It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. Lack of impartiality or of fairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the process, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned. The provisional nature of the decision also justifies ignoring non-material breaches. Such errors, if apparent (as they usually are), will be rectified in any negotiation and settlement based upon the decision. The consequence of material issues and points is that the dispute referred to adjudication will not have been resolved satisfactorily by any fundamental standard and the chances of it providing the basis for a settlement are much less and the chances of it proceeding to arbitration or litigation are much greater however the time limits, the nature of the process and the ultimately non-binding nature of the decision, all mean that the standard required in practice is not that which is expected of an arbitrator. Adjudication is closer to arbitration than an expert determination but it is not the same.

[28] From the decision as a whole, it would appear that the adjudicator had gone on with the task at hand and had arrived at his decision as to how the progress claims were to be addressed.

[29] The adjudicator had looked at the set-off and counterclaim, and found too many uncertainties thus best resolved at another time. His reasons had been given.

[30] The decision to let set-off and counterclaim was on the basis there were not sufficient materials or conclusiveness, which would only come at the end of the project and that would be when the issue can be dealt with comprehensively.

[31] It did not appear to be the case that the adjudicator, having decided that he had jurisdiction, did not exercise that jurisdiction correctly, or that he had decided that he did not have jurisdiction, when he did in fact have such jurisdiction.

[32] I therefore dismiss the plaintiff's application to set aside the adjudication decision dated 30 December 2016, and I allow the applicant/Southern's application to enforce the said adjudication decision. Costs of RM10,000 subject to allocator, in respect of both matters shall be paid by MRCB to Southern.